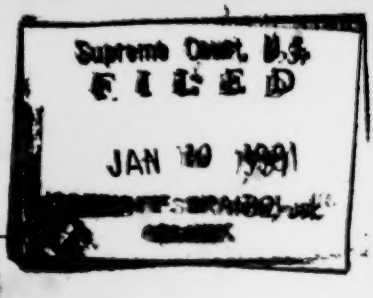
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(1)



No. _____

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1990

JEROME GOLOCHOWICZ,

Petitioner

vs.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner Jerome Golochowicz was charged with first degree murder, but no special circumstances were listed. At the bindover the prosecutor argued premeditation. In the opening argument at trial, the prosecutor stated he was required to prove premeditation. At the end of the trial, the prosecutor moved to add a charge of felony murder in the course of a larceny, and the motion was granted over defense objection. Defendant was convicted of felony murder and acquitted of premeditated murder.

Question 1: Are premeditated murder, and felony murder in the course of a larceny, different crimes because they have different elements, or are they merely different "theories" which need not be separately charged?

Question 2: Do the due process right to notice of the charge and related due process rights require that a charge of felony murder in the course of a larceny include mention of felony murder and specification of which underlying felony is being charged, or can the prosecutor decide what elements are charged after the close of proofs?

Question 3: Did the judicial history of the case, including the first trial where only premeditated murder was instructed on, the

intervening preliminary examination where only premeditated murder was argued, and the prosecutor's opening argument at trial stating that premeditation must be proved, serve to inform the accused that he faced only premeditated murder and not murder in the course of a larceny?

Question 4: Did the trial judge's previously stated opinion about the effectiveness of the attorney require him to disqualify himself from the hearing on ineffective assistance of counsel?

Question 5: Was counsel ineffective for failing to properly prepare, for failing to allow Petitioner access to discovery, for switching his theories of defense back and forth, for releasing a confidential document which included important statements of the accused, and other shortcomings?

TABLE OF CONTENTS

QUESTIONS PRESENTED		i
TABLE OF CONTENTS		iii
INDEX OF AUTHORITIES		iv
OPINIONS BELOW		2
STATEMENT OF JURISDICTION		2
CONSTITUTIONAL PROVISIONS INVOLVED		2
STATUTE INVOLVED		3
STATEMENT OF THE CASE		4
REASONS FOR GRANTING THE WRIT		9
	QUESTIONS 1, 2 AND 3	9
	QUESTION 4	26
	QUESTION 5	27
CONCLUSION		29
APPENDIX		A1
A	Opinion of the United States Court of Appeals for the Sixth Circuit	A1
B	Opinion of the United States District Court, Eastern District of Michigan	A10

INDEX OF AUTHORITIES

Authority	Page
Blake v. Morford, 563 F.2d 248 (6th Cir. 1977)	13
Bryant v. State, 192 N.E. 795, 48 Ohio App. 208 (1933)	24
Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514; 92 L.Ed. 644 (1948)	13
DeJonge v. Oregon, 229 U.S. 353; 57 S.Ct. 285, 81 L. Ed. 278 (1937)	13
Dunn v. United States, 442 U.S. 100; 99 S.Ct. 2190; 60 L.Ed.2d 743 (1979)	17
Gardner v. A.H. Robins Co., 747 F.2d 1180 (8th Cir. 1984)	27
Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986)	10,17,18, 19,20,21, 22,23,24
Givens v. State, 655 P.2d 533 (Nev. 1982)	24
Gray v. Raines, 662 F.2d 569 (9th Cir. 1981)	21
In Re Murchison, 349 U.S. 133; 75 S.Ct. 623; 99 L.Ed. 942 (1955)	27
In Re Ruffalo, 390 U.S. 544; 88 S.Ct. 1222; 20 L.Ed.2d 117 (1968)	13
Kuhlmann v. Wilson, 477 U.S. 436; 106 S.Ct. 2616; 91 L.Ed.2d 364 (1986)	11,25
Koontz v. Glossa, 731 F.2d 365 (6th Cir. 1984)	12,16
Martin v. Foltz, 773 F.2d 711 (6th Cir. 1988)	15
Murray v. Carrier, 477 U.S. 478; 106 S.Ct. 2639; 91 L.Ed.2d 397(1986)	11,25
Olsen v. McFaul, 843 F.2d 918 (6th Cir. 1988)	12
People v. Aaron, 409 Mich. 672 (1980)	21
People v. Golochowicz, 413 Mich. 298 (1982)	4
People v. Martin, 75 Mich. App. 6 (1977)	15,25
Russell v. United States, 369 U.S. 749; 82 S.Ct. 1038; 8 L.Ed.2d 240 (1962)	10,13,14, 15,19,20, 26

Schad v. Arizona, cert granted
112 L.Ed.2d 202 (1990) 10,23
Schmuck v. United States, 489 U.S. ___;
109 S. Ct 1443; 103 L.Ed.2d 734 (1989) 9,10,15,21
State v. Ferguson, 175 Ohio St. 390 (1964) 24,25
State v. Schad, 163 Ariz 411;
788 P.2d 1162 (1989) 10
Stirone v. United States, 361 U.S. 212;
80 S.Ct. 270; 4 L.Ed.2d 252 (1960) 13
Strickland v. Washington, 466 U.S. 668;
104 S.Ct. 2052; 80 L.Ed.2d 674 (1984)
Turner v. State, 605 P.2d 1140 (Nev. 1980) 24
United States v. Heller, 579 F.2d 990
(6th Cir. 1978) 18,26
United States v. Jones, 647 F.2d 696
(6th Cir. 1981) 19,20
United States v. Robison, 904 F.2d 365
(6th Cir. 1990) 20,24
United States v. Rojo, 727 F.2d 1415
(9th Cir. 1983) 18
United States v. Weiss, 752 F.2d 777
(2d Cir. 1985) 13,19
United States v. Yeo, 739 F.2d 385 (8th Cir. 1984) 20,24
Watson v. Jago, 558 F.2d. 330 (6th Cir. 1977) 12,16,17,
20,24

U.S. Const., Amend. VI 28
U.S. Const., Amend XIV 13,22,27,
28

M.C.L. 750.316 13,19,20

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1990

JEROME GOLOCHOWICZ,

Petitioner

vs.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Jerome Golochowicz, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit, issued October 22, 1990.

OPINIONS BELOW

Tne opinion of the Sixth Circuit Court of Appeals of October 22, 1990 is attached as Appendix A, beginning at page A1. The opinion of the United States District Court for the Eastern District of Michigan of August 31, 1989 is attached as Appendix B, beginning at page A10.

STATEMENT OF JURISDICTION

This case was filed in U.S. District Court as a Petition for Writ of Habeas Corpus for a state prisoner being held in violation of the constitution of the United States, with jurisdiction attaching under 28 U.S.C. §2254. Habeas corpus relief was denied.

The final judgment of the U.S. Court of Appeals for the Sixth Circuit affirming the District Court was entered October 22, 1990. This Court has jurisdiction to entertain a Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

STATUTE INVOLVED

M.C.L. 750.316 provides:

"Murder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entereing of a dwelling, larceny of any kind, extortion, or kidnapping, is murder of the first degree, and shall be punished by imprisonment for life."

STATEMENT OF THE CASE

Petitioner Jerome Golochowicz is presently serving a sentence of life imprisonment in a Michigan state prison upon his conviction for first degree murder, pursuant to M.C.L. 750.316.

Petitioner was charged with "murder," and tried and convicted in circuit court of first degree premeditated murder on May 6, 1977. No charge of felony murder in the course of a larceny was made or instructed on. That conviction was reversed by the Michigan Supreme Court for evidentiary error on May 17, 1982. *People v. Golochowicz*, 413 Mich. 298 (1982).

After reversal, the case went to district court, and Petitioner was again bound over on "murder." A jury trial was then held in the Oakland County Circuit Court before the Hon. Frederick C. Ziem. At the conclusion of the trial, the court instructed not only on premeditated murder, but also on felony murder, murder committed in the course of a larceny. Petitioner was convicted of felony murder, and acquitted of premeditated murder, and was sentenced to life in prison on February 15, 1983.

A post-trial hearing was held upon remand by the Michigan Court of Appeals, regarding the issue of ineffective assistance of counsel. The hearing took place October 18, 1983 before the Hon. Frederick C.

Ziem. Judge Ziem stated prior to the hearing that Petitioner was "very capably represented by counsel." (T 3, 104).

Subsequent appeals raising the instant issues were denied in the Michigan Court of Appeals and Michigan Supreme Court. Habeas Corpus was denied in the U.S. District Court and U.S. Court of Appeals.

Donald Mitchell, a 49 year old man, was found dead on his bed in his condominium in Novi, Michigan, on November 1, 1976. The cause of death was asphyxia, caused by his being strangled with the belt from his bathrobe. (T1, 54, 162). Sperm was found in his anus. (T1, 166). No one testified to having witnessed the killing.

Numerous items of property of the deceased were found in the possession of brothers Dennis and Paul O'Clair. Numerous witnesses testified to buying items of Mitchell's property from the O'Clairs.[1]

On November 6, 1976, witness Harold Seldes, an employee of Campau Drugs in Hamtramck, Michigan, made a sale to Mr. Golochowicz, who paid by using the credit card of Mr. Mitchell. (T1, 179-182). Mr. Golochowicz made another purchase with the credit

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[1] The Court of Appeals opinion (App. 2) suggests that Petitioner was caught selling this property. In fact, it was the O'Clair's who were identified by witnesses as selling the property. Apart from the testimony of the O'Clair's, Petitioner was directly connected only to use of the credit card.

card that day, according to witness Andrea Morowski. (T1, 188-190).

Sgt. Edward Davis of the Michigan State Police testified that in the living room of Mr. Mitchell's condominium a TV Guide was found which had the fingerprint of Mr. Golochowicz. He also found a fingerprint of Mr. Golochowicz on a dish in the dishwasher. (T2, 30, 38). There was no sign of forcible entry into the condominium. (T2, 31).

Dennis O'Clair testified that Mr. Golochowicz gave him the various items of property that were later identified as Mr. Mitchell's. (T1, 194-197). According to Dennis O'Clair, Petitioner asked him for help in cashing a check, and O'Clair did so. O'Clair and Golochowicz then allegedly used the money to buy drugs which the two of them injected. They then repeated this with a second check. (T1, 199-202).

Paul O'Clair, brother of Dennis O'Clair, testified that the property of Mr. Mitchell found in his and his brother's possession came from Mr. Golochowicz. (T1, 235-238). He sold Mr. Mitchell's car to witness John Mylenek, but claimed he did this at the request of Mr. Golochowicz. (T1, 243).

At the time of the preliminary examination, the prosecutor argued that Petitioner committed a premeditated and deliberated killing of Mr. Mitchell, and made no argument regarding felony murder.

(PE1, 13-16; PE2, 32-33). Based on that argument, the court bound Petitioner over on a charge of "murder." (PE2, 33-34). An information was filed charging Petitioner with "murder," and citing M.C.L. 750.316.

At trial, during opening argument, the prosecutor informed the jury that he was required to prove that there was premeditation and deliberation. (T1, 33):

> "But to give you an idea of what I have to prove in this case, to satisfy the People's burden of proof, the following elements have to be shown, to prove first degree murder: We have to show that the victim died on or about October 29, 1976, within the County of Oakland.
>
> That the victim died as a result of an action of this Defendant, Jerome Golochowicz, and that there is nothing in the evidence to justify or excuse the killing.
>
> That Jerome Golochowicz intended to kill Mr. Mitchell. That he did so with premeditation and deliberation.
>
> Those last two elements, premeditation and deliberation, raises the crime from second degree murder to first degree murder. Premeditation and deliberation are words or art, in the law. It means the Defendant designed and planned to kill him, and had an opportunity to subject the nature of his action to a second look, and used measured actions, when he killed Donald Mitchell."

At the conclusion of the proofs, the prosecutor decided to change the charge to murder committed in the course of a felony, and the judge agreed to allow this over defense objection. (T3, 2, 80). The judge then instructed on felony murder as an alternate means of conviction. (T3, 73-75). The judge instructed that the underlying crime for felony murder was larceny, and instructed the jury on the elements of murder committed in the course of a larceny. (T3, 75-76).

The jury returned a verdict finding the Defendant guilty of "First Degree Felony Murder." (T3, 97).

Petitioner testified at an evidentiary hearing in state court that the defense lacked notice of the felony murder in the course of a larceny charge. (T Oct 18 1983, 77-78).

It was also disclosed at the hearing that defense counsel, Mr. Wolfram, without the consent of Petitioner, (E.H. 39, 66) released to the prosecutor and court before trial a privileged psychological report. (E.H. 33-37, 72). Petitioner was threatened that if he took the stand, the report would be used against him for impeachment. (E.H. 36-37, 93). Based on that, Petitioner did not take the stand and tell his side of the story. (E.H. 79).

REASONS FOR GRANTING THE WRIT

Question 1: Are premeditated murder, and felony murder in the course of a larceny, different crimes because they have different elements, or are they merely different "theories" which need not be separately charged?

Question 2: Do the due process right to notice of the charge and related due process rights require that a charge of felony murder in the course of a larceny include mention of felony murder and specification of which underlying felony is being charged, or can the prosecutor decide what elements are charged after the close of proofs?

Question 3: Did the judicial history of the case, including the first trial where only premeditated murder was instructed on, the intervening preliminary examination where only premeditated murder was argued, and the prosecutor's opening argument at trial stating that premeditation must be proved, serve to inform the accused that he faced only premeditated murder and not murder in the course of a larceny?

In *Schmuck v. United States*, 489 U.S. ___; 109 S. Ct 1443; 103 L.Ed.2d 734 (1989), the Court held that:

"Were the prosecutor able to request an

> instruction on an offense whose elements were not charged in the indictment, [the] right to notice would be placed in jeopardy."

In this case, the Sixth Circuit held that it was acceptable to try Petitioner on a charge of premeditated murder, and then add the charge of felony murder in the course of a larceny after the proofs were closed. Petitioner submits that the Sixth Circuit decision vitiates the rules for certainty in the charging of an offense adopted by this Court in *Russell v. United States*, 369 U.S. 749, 765; 82 S.Ct. 1038; 8 L.Ed.2d 240 (1962), and recently reaffirmed in *Schmuck* . Since the *Schmuck* case seems to support the continuing vitality of *Russell*, but not to the Sixth Circuit, the *Russell* opinion should be revisited and reaffirmed in light of *Schmuck*.

The decision herein also directly conflicts with the Ninth Circuit decision in *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986). Certiorari should be granted to resolve the conflict between circuits.

The issues herein relating to lack of notice of the charge are analogous to issues involved in *Schad v. Arizona*, cert granted 112 L.Ed.2d 202 (1990). *Schad*, like the instant case, involves a question of whether premeditated murder and felony murder are one crime, or different crimes. See *State v. Schad*, 163 Ariz 411; 788 P.2d 1162 (1989).

The Sixth Circuit held that premeditated murder and felony murder are two different crimes in Ohio, but not in Michigan. The supposed difference in case law between the states does not exist, and if it did exist, would be constitutionally insignificant. Under the instant holding, it is constitutional to do in Michigan that which would be unconstitutional if done in Ohio or other states. The ruling will therefore result in an enormous diminution of procedural fairness in Michigan. Certiorari should be granted to preserve equal administration of the laws between Michigan and other states.

The Sixth Circuit appears to abandon the rule, which previously controlled in that circuit and others, that changing the charge after the trial has started is presumptively prejudicial. They then use tortured logic to conclude that knowing what charge one faces is of no benefit to a defendant facing a criminal charge. This case demonstrates the wisdom of the presumed prejudice rule as to notice of charges. If this Court rejects that rule, this case still presents an opportunity to explore when lack of notice of the charge is to be considered harmless.

Certiorari should also be granted to deal with the Sixth Circuit's misuse of *Murray v. Carrier*, 477 U.S. 478; 106 S.Ct. 2639; 91 L.Ed.2d 397(1986) and *Kuhlmann v. Wilson*, 477 U.S. 436; 106 S.Ct. 2616; 91 L.Ed.2d 364 (1986). The Sixth Circuit placed

heavy reliance on these cases even though the holdings have nothing to do with the issues at hand.

All of the way through Petitioner Jerome Golochowicz's trial for "murder," Defendant and counsel believed that the charge was premeditated murder. After all, at his first trial the judge instructed the jury only on the offense of premeditated murder. At the preliminary examination, the prosecutor's argument for bindover mentioned premeditation, and said nothing about murder in the course of a larceny. In opening argument at the trial, the prosecutor informed the jury of the requirement that he must prove premeditation and deliberation.

Imagine counsel's surprise when, after the close of proofs, the prosecutor moved for and received an amendment to the charges, to add the charge of felony murder in the course of a larceny. Counsel objected, but the objection was overruled. Petitioner was found not guilty of premeditated murder, but guilty of the added charge of felony murder in the course of a larceny.

A criminal defendant is entitled to be proceeded against under an indictment or information which, with a fair degree of certainty, specifies the particular charge made against him and which fixes the scope of the prosecution. See, *inter alia*,*Watson v. Jago*, 558 F.2d. 330 (6th Cir. 1977); *Koontz v. Glossa*, 731 F.2d 365 (6th Cir. 1984); *Olsen v. McFaul*, 843 F.2d 918,

930-931 (6th Cir. 1988); see also *In Re Ruffalo*, 390 U.S. 544; 88 S.Ct. 1222; 20 L.Ed.2d 117 (1968); *Blake v. Morford*, 563 F.2d 248 (6th Cir. 1977); *United States v. Weiss*, 752 F.2d 777 (2d Cir. 1985). This is sometimes called the right to fair notice of the charges against you. *Cole v. Arkansas*, 333 U.S. 196, 201; 68 S.Ct. 514; 92 L.Ed. 644 (1948). The judge has the duty to instruct on the charge stated in the information, and instructions which permit a conviction on a crime other than that charged deny due process. U.S. Const., Amend XIV; *DeJonge v. Oregon*, 229 U.S. 353; 57 S.Ct. 285, 81 L. Ed. 278 (1937); *Stirone v. United States*, 361 U.S. 212; 80 S.Ct. 270; 4 L.Ed.2d 252 (1960).

Michigan's first-degree murder statute, M.C.L. 750.316, includes the crime of premeditated and deliberated murder, but also includes 18 other statutory crimes that constitute first degree murder, each having different elements, such as murder by poison, murder in the course of an arson, murder in the course of a rape, etc. The citation in the information to "murder" and to M.C.L. 750.316 may be sufficient to charge premeditated murder, but it cannot reasonably be held to charge all 19 of the different crimes known as first degree murder.

In *Russell v. United States*, supra, this Court held:

"In an indictment upon a statute, it is not

> sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

In *Russell*, the Defendants were charged with refusing to testify at a congressional hearing. The indictment specified an incident and charged a single statutory "crime," but the statute in fact included numerous offenses that could involve different elements. The Supreme Court held that a criminal defendant must be informed in advance of trial of the elements of the crime or crimes with which he is being charged. In reversing the conviction of Mr. Price in *Russell*, this Court stated, 369 U.S. at 768:

> "At every stage in the ensuing criminal proceeding Price was met with a different theory, or by no theory at all, as to what the topic [of the congressional hearing] had been. Far from informing Price of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large -- to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal."

Petitioner Golochowicz at all stages was met with

the theory of premeditated murder, until the proofs were over, at which point he was met with the theory of murder in the course of a larceny. The prosecutor was left free to roam at large, to shift his theory of criminality to take advantage of the passing vicissitudes of the trial. The prosecutor, at the end of proofs, was left free to pick and choose from 19 different crimes, free to choose murder in the course of a larceny despite the absence of mention of larceny from the information, and despite his own opening statement that argued that the crime with which he was charging Petitioner required premeditation and deliberation.

It is clear that under *Russell* and *Schmuck*, premeditated murder is a different crime from felony murder in the course of a larceny. *Schmuck* adopts the "elements test" for determining what crime is charged. Both Michigan, *People v. Martin*, 75 Mich. App. 6, 12 (1977) and the Sixth Circuit, *Martin v. Foltz*, 773 F.2d 711, 717 (6th Cir. 1988) (arising out of Michigan) have previously recognized that premeditated murder and felony murder have different elements and are therefore separate crimes, even though prohibited by the same statute.

Petitioner submits that under *Russell*, the prosecutor must specify his choices of which crimes are charged, however many there may be, well before trial starts, not in the middle of a trial after the proofs

are closed. See *Koontz v. Glossa*, supra, where the Sixth Circuit granted habeas corpus when the change in charges was made 3 days before trial. Petitioner Golochowicz had far, far less notice than did the Petitioner in *Koontz v. Glossa*. Petitioner Golochowicz and his attorney had absolutely no knowledge that a taking, a lack of consent of the owner, an intent to steal, etc., were elements of the crimes he was being charged with until after the proofs were closed.

In *Watson v. Jago*, supra, the Sixth Circuit found a constructive amendment of the charges where the defendant was forced to defend against a charge of felony murder in the course of a robbery, upon a charging document which charged premeditated murder. Because felony murder in the course of a robbery had elements additional to those of premeditated murder (i.e., committing a robbery, specific intent to steal, killing committed in the course of the robbery), the defendant could not constitutionally be forced to defend against that charge.

The instant case is similar to that of *Watson v. Jago*. In the instant case, felony murder in the course of a larceny includes elements not included within the charge of murder as stated in the information, i.e., not only that a killing occurred, but that there was a taking of property, that there was no consent of the owner, that there was an intent to permanently deprive the

owner of the property, and that the killing took place in the course of this taking. Further, the instant instructions deleted elements, by making it possible for the jurors to convict Petitioner without finding that Petitioner acted with premeditation and deliberation. Adding some elements and deleting others means that "there has been a modification at trial in the elements of the crime charged," *Watson v. Jago*, supra, and therefore the judge's instructions constituted a de facto amendment of the charges, which is constitutional error. *Watson v. Jago*; *Dunn v. United States*, 442 U.S. 100; 99 S.Ct. 2190; 60 L.Ed.2d 743 (1979).

This case is similar to that of *Watson v. Jago*, but is virtually indistinguishable from that of *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986). In *Givens*, the petitioner was charged in an information that mentioned the Nevada first-degree murder statute that encompassed more than one type of murder. The information did not list "murder by torture" or the word "torture" at all, although it did cite the statute that lists numerous forms of first-degree murder, including murder by torture. The judge instructed the jury on first-degree murder by torture. The Ninth Circuit granted habeas corpus relief. The Court stated:

"We agree with Givens that the

> information was constitutionally inadequate to support a charge of murder by torture. The brief factual recitation in the information, while sufficient to provide notice of a charge of ordinary first-degree murder, does not suggest the special elements of murder by torture...Nor does the information's mere citation to a statutory section which defines the degrees of murder -- and identifies murder by torture as one type of first-degree murder -- provide adequate notice of the charge. *United States v. Rojo*, 727 F.2d 1415, 1418 (9th Cir. 1983)."

If one were to take the above quote, and substitute the words "larceny" for "torture," and "Golochowicz" for "Givens," the statement would be equally true. The instant decision is therefore in conflict with *Givens v. Housewright*, and certiorari should be granted to determine which, if either, accurately states the test.

Where the information does not mention larceny as something the Petitioner is charged with, and where the bindover judge did not state that he was finding a larceny or murder in the course of a larceny, the Petitioner has the right to assume murder in the course of a larceny is not something he is charged with, just as he had the right to assume he was not being charged with murder in the course of an arson or rape.

In *United States v. Heller*, 579 F.2d 990. 999 (6th Cir. 1978) the Court found an indictment defective, holding that "since it fails to charge an essential element

of the crime defined by the statute, the indictment cannot stand." Nowhere in the instant information does the word "larceny" or any equivalent word (theft, stealing, etc.) appear.

Indeed, the prosecutor's opening argument at trial shows that the prosecutor, just like the defense counsel, believed the charge was premeditated murder, and confirms that defense counsel's complaint of surprise was genuine. The prosecutor cannot be permitted to switch to murder in the course of a larceny simply because the trial on the charged crime seems to be going badly. The prosecutor cannot be permitted to mislead defense counsel by arguing one crime and then seeking conviction on another. A criminal defendant has the right to rely on the prosecutor's opening statement in determining what he is being tried for. *United States v. Weiss,* supra, 752 F.2d at 788.

The Sixth Circuit held (App. A4) that the mention of M.C.L. 750.316 gave Petitioner notice that all crimes under that statute were being charged. However, in *Givens v. Housewright*, supra, and *United States v. Jones*, 647 F.2d 696, 699 (6th Cir. 1981), the Courts expressly held that a reference in the indictment or information to a statute does not give notice of more than one charge where the statute includes within it a variety of different charges. The same rule is implicit in *Russell v. United States*.

Petitioner submits that the citation in the

information to M.C.L. 750.316 no more specifies that the charge is to be murder in the course of a larceny than it specifies that the charge is to be murder in the course of an arson or rape. *Givens v. Housewright*, supra; *United States v. Jones*, supra; *Russell v. United States*, supra. The citation in the information to M.C.L. 750.316 no more specifies that the charge is to be murder in the course of a larceny than a citation to Nev. Rev. Stat. §200.030 specifies that the charge is to be murder by torture. *Givens v. Housewright*, supra.

The Sixth Circuit also also relied on a purported absence of prejudice (App. A4-A7). This departs from the preexisting rule that prejudice need not be shown from the mid-trial amendment of charges, *Watson v. Jago*, supra; *United States v. Robison*, 904 F.2d 365 (6th Cir. 1990); *United States v. Yeo*, 739 F.2d 385 (8th Cir. 1984).

In finding no prejudice, the ruling states (App. A6) that "in our case there is no dispute that a larceny occurred." However, it should be noted that Petitioner did not take the stand, and therefore had no occasion either to dispute or agree that a larceny occurred. It is imperative that an accused know which crimes he is charged with before strategy decisions like whether to testify are made.

In finding no prejudice, the panel ignores that even if a larceny did occur, that would not automatically make the killing a felony murder, because the killing

may not have been done by the thief, or if done by the thief, may not have been done "in the course of" the larceny. *People v. Aaron*, 409 Mich. 672 (1980). Of course Petitioner and his counsel had no occasion to decide whether Petitioner should take the stand to dispute a larceny or "in the course of" because they did not know that "in the course of a larceny" was being charged.

The Sixth Circuit's holding (App. A5) that the trial evidence gave notice of the charge is flawed, because one identifies what has been charged "by reference to the statutory elements of the offenses in question, and not...by reference to conduct proved at trial." *Schmuck v. United States*, supra, 103 L.Ed.2d at 746-747.

In that regard, we note that sperm was found in the anus of the deceased, but this could not give notice that the charge was murder in the course of a rape. Under *Schmuck*, it is the charging document, not the evidence, which controls which crime is being charged. See *Gray v. Raines*, 662 F.2d 569 (9th Cir. 1981) [in sex case evidence of girl's age is not notice that age-related sex offense is charged]; *Givens v. Housewright*, supra [in murder case evidence of torture is not notice that murder by torture is charged].

Prejudice from the lack of notice is clearly shown. Because Petitioner went through the entire trial without notice that he would have to defend against the charge that the killing occurred in the course of a larceny, the

lack of notice deprived Petitioner of several actual defenses to the charge on which the judge instructed.

A defense directed at disputing either a taking, or the lack of consent of the property owner, or that the killing was in the course of the larceny, could have been mounted, but was not, because "in the course of a larceny" was not something charged in any document or even verbally. Deprivation of these opportunities to defend is actual prejudice.

Counsel directed his questioning and argument, indeed, his whole case, at disproving the charge he thought was being tried (premeditated murder). For counsel to learn at the end of the trial that there was a second charge being tried (murder in the course of a larceny) means that the trial on the second charge was fundamentally unfair, and therefore a denial of due process. U.S. Const., Amend. XIV. A defendant and his lawyer are entitled to know what is being charged before the trial starts, not after the evidence is in.

Furthermore, adding the charge meant that certain elements were eliminated from jury consideration. The charged offense required premeditation and deliberation. The jury was able to convict Petitioner without the need to find that he premeditated and deliberated. That is also actual prejudice.

The discussion on prejudice in *Givens v. Housewright*, supra,786 F.2d at 1381, uses a similar analysis to conclude that petitioner Givens was

prejudiced:

> "From the information, Givens might reasonably have believed that the state had to prove intent to kill or intent to inflict grievous bodily harm in order to obtain a conviction for first degree murder. He would therefore have seen little reason to dispute evidence suggesting instead an intent to cause cruel pain and suffering. He also would not have been warned of the need to show that he had not acted for the purpose of revenge, extortion, persuasion, or any sadistic purpose. We therefore conclude that the information did not provide notice adequate to enable Givens to prepare a defense against the charge of murder by torture."

This case is virtually indistinguishable from *Givens v. Housewright*, and the same result should be reached: a grant of habeas corpus relief.

The jury in this case specified that Petitioner was convicted only of felony-murder, and not of premeditated murder, so actual prejudice is even more clear than in *Givens v. Housewright*, where the jury did not specify that they were relying only on the added charge in finding the petitioner guilty. That distinguishes this case from *Schad v. Arizona*, supra, where certiorari was recently granted. In this case, the added charge was the only basis of conviction.

Adding a charge in this manner is "prejudicial per

se," *Watson v. Jago*, supra; *United States v. Robison*, supra; *United States v. Yeo*, supra. Petitioner submits that actual prejudice is manifest, and that the presence of both actual and presumed prejudice requires the grant of habeas corpus relief.

The Sixth Circuit stressed (App. A6) that in Ohio, the case of *State v. Ferguson*, 175 Ohio St. 390 (1964) holds that premeditated murder and the various forms of felony murder are different crimes. However, the purported case law distinctions between Ohio[1] and

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[1] The District Judge ruled (App. A11) that Michigan cases suggesting the instant practice to be proper (which actually involved different situations) served to give notice of the charge of felony murder in the course of a larceny. This was purported to stand in distinction to the case law of Ohio and Nevada. The distinction in case law simply does not exist. In *Turner v. State*, 605 P.2d 1140 (Nev. 1980), the Nevada Supreme Court held: "It is permissible to instruct regarding felony murder even though felony murder is not pleaded."

Two years later, in the *Givens* case itself, the claim that it was improper to charge murder and then convict on murder by torture was rejected by the Nevada Supreme Court as being unworthy of discussion. *Givens v. State*, 655 P.2d 533 (Nev. 1982).

Similarly, Ohio courts have also approved the practice found unconstitutional by the Sixth and Ninth Circuits in *Watson v. Jago* and *Givens v. Housewright*. See *Bryant v. State*, 192 N.E. 795, 48 Ohio App. 208 (1933). While the *Watson* case was unreported in the Ohio state courts, it is clear that the Ohio courts approved the practice which the Sixth Circuit held to be unconstitutional.

The Sixth Circuit appears to have abandoned this alleged distinction among state court rulings as a basis for determining the constitutional issues.

Michigan simply do not exist. Michigan's *People v. Martin*, supra, like Ohio's *State v. Ferguson*, supra, also holds that premeditated murder and the various forms of felony murder are different crimes even though prohibited by the same statutes, because they have different elements. Indeed, it would be difficult in light of *Russell* and *Schmuck* to maintain that crimes with different elements are the same crime. The statement in *State v. Ferguson* is little more than a legal tautology obviously applicable to all states.

There simply is no meaningful difference between case law and statutes in Michigan and those in Ohio and Nevada that makes a practice held to be unconstitutional in Ohio and Nevada to be constitutional in Michigan. The Sixth Circuit clearly erred.

The Sixth Circuit also relied on *Murray v. Carrier*, supra, and *Kuhlmann v. Wilson*, supra, to deny relief. *Murray* was a habeas corpus case involving failure to exhaust state court remedies, which was not an issue here. *Kuhlmann* involved the rules for successive petitions for habeas corpus, which cannot apply to this, Petitioner's first petition. The Sixth Circuit ruled that these cases provided a "backdrop" for judging Petitioner Golochowicz's case. Petitioner submits that it is not the atmosphere created by cases that forms a basis for decision; it is the holdings of the cases. Certiorari should be granted so as to prevent the *Murray* and *Kuhlmann* cases from

being misinterpreted and applied to cases to which they do not apply.

Petitioner submits that the differences between premeditated murder and murder in the course of a larceny are not merely differences in "thrust" (App. A1) or "theory" (App. A3, A5) or "emphasis" (App. A8), but differences in the elements that are charged. *Russell* and *Heller* hold that if larceny is not mentioned in the information, then no crime with larceny as an element has been charged. If the instant decision is correct, then *Russell* and *Heller* are wrong. Certiorari should be granted to determine whether a charge of felony murder in the course of a larceny requires mention of felony murder and specification of which underlying felony is being charged, or whether the prosecutor can decide what crime is charged after the close of proofs.

The federal constitutional issues here are real and substantial, and the clear procedural history makes the case exceptionally suitable for Supreme Court review.

Question 4: Did the trial judge's previously stated opinion about the effectiveness of the attorney require him to disqualify himself from the hearing on ineffective assistance of counsel?

The Michigan Court of Appeals remanded the

case to the trial court for a hearing on the claim of ineffective assistance of counsel. The trial judge had previously stated that Petitioner had been very capably represented by counsel. The trial judge prejudged the very matter he was to decide. The subsequent conducting of the hearing itself was rendered pointless.

The question of judicial bias and prejudgment is often discussed in U.S. Circuit Court opinions, but seldom in the U.S. Supreme Court. Yet, it is essential to due process that a hearing be conducted before a tribunal free from bias or prejudgment. U.S. Const, Amend. XIV; *Gardner v. A.H. Robins Co.*, 747 F.2d 1180 (8th Cir. 1984). Indeed, disqualification is required when necessary for the "appearance of justice." *In Re Murchison*, 349 U.S. 133; 75 S.Ct. 623; 99 L.Ed. 942 (1955). This case, involving a simple factual predicate, is quite suitable for exploring this issue.

Question 5: Was counsel ineffective for failing to properly prepare, for failing to allow Petitioner access to discovery, for switching his theories of defense back and forth, for releasing a confidential document which included important statements of the accused, and other shortcomings?

A criminal defendant is entitled to the effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); U.S. Const., Amends. VI, XIV. This case applies the general principles to a specific factual setting.

Counsel, without permission from the Petitioner, released to the prosecutor a statement by Petitioner regarding the incident in question. Petitioner was threatened that if he took the stand, the report would be used against him for impeachment. Based on that, Petitioner did not take the stand and tell his side of the story.

Counsel refused Petitioner's requests to be allowed to see and have copies of the discovery materials. The Sixth Circuit (App. A9) adopted the District Court's ruling (App. A14) holding that "defendant had a right to become personally involved in the preparation of his defense." However, neither court provided any means of enforcing this right. A right which cannot be enforced is of course no right at all. If the right is recognized, so also must the remedy be recognized.

These and the other circumstances of the case suggest that there was indeed ineffective assistance of counsel which this Court should review.

Conclusion.

Petitioner Jerome Golochowicz respectfully submits that for the above reasons, this Court should grant the Writ of Certiorari and grant either plenary consideration or summary reversal.

Respectfully submitted,

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Dated: December 29, 1990

NO. 89-2071
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEROME GOLOCHOWICZ

Petitioner-Appellant,

v.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan

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Before: JONES and GUY, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM. Petitioner, Jerome Golochowicz, appeals from the denial of his habeas corpus petition. Golochowicz sought habeas relief under a number of theories, chief of which was that he was convicted of felony-murder after a trial in which the principal prosecutive thrust was premeditated murder. Upon a review of this issue as well as petitioner's other claims of error, we conclude that the denial of the writ was proper and we affirm.

I.

On November 1, 1976, Donald Mitchell was found dead at his home, having been strangled to death. There were no eyewitnesses to the killing. Petitioner

was ultimately arrested and charged with the murder. Although the evidence was circumstantial, it was strong. Golochowicz's fingerprints were found in Mitchell's condominium and Golochowicz also was in possession of, and sold a number of, items taken from the victim's house at the time of the murder, including a yellow Lincoln automobile. Some of Golochowicz's cronies to whom he offered to sell the stolen goods testified against him. Petitioner also used credit cards taken from the victim and cashed checks taken from the victim's stolen checkbook.

At trial, the prosecution, over objection, also introduced one other telling piece of evidence. Dennis O'Clare, one of the persons to whom petitioner first offered the stolen goods, testified that on November 4, 1976, Golochowicz offered him a Sony television set. In order to get it, however, O'Clare had to accompany Golochowicz to a house where O'Clare discovered a dead body. The apparent cause of death was strangulation by an electrical cord in much the same manner as Mitchell had been strangled. After they looted the house, Golochowicz admitted to O'Clare that he had killed the man in the house and described how he did it, although later denied that he did it.

After being found guilty of first degree murder, Golochowicz appealed his conviction and, although it was affirmed by the Michigan Court of Appeals,[1] it was later reversed by the Michigan Supreme Court.[2] In a 4-3 decision, the Michigan Supreme Court concluded that the evidence as to the second killing should not have been admitted into evidence under the "similar

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[1] People v. Golochowicz, 89 Mich. App. 57 (1979)

[2] People v. Golochowicz, 413 Mich. 298 (1982).

acts rule."

Golochowicz was retried and again found guilty. At the second trial, the prosecution, of course, had to proceed without the benefit of the jury learning of the second murder. It appears clear that the prosecution again was proceeding on a premeditated murder theory. At the end of the case, however, the prosecution asked for and received, over objection, a felony-murder instruction. The jury found Golochowicz guilty of felony-murder.

This second conviction was appealed and upheld by the Michigan Court of Appeals.[3] The Michigan Supreme Court declined review.

II.

After Golochowicz's first conviction was reversed and the case remanded, a new preliminary examination was held and Golochowicz was bound over for trial. The prosecution then filed an information charging that petitioner "did murder Donald Havens Mitchell; contrary to Section 750.316 of the Compiled Laws of 1970, as amended, M.S.A. 28.548. (Maximum Penalty - Life)." (App. 12). By citing Mich. Comp. Laws. Ann. § 750.316, it is clear that murder in the first degree was charged.[4] In 1976, Mich. Comp. Laws. Ann. §750.316 read in pertinent part:

> All murder which shall be perpetrated by means of poison, or lying in wait, or any kind of

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[3] People v. Golochowicz, Docket No. 70322 (unpublished).

[4] Mich. Comp. Laws Ann. §750.317 covers second degree murder.

> wilful, deliberate and premeditated killing, or which shall be committed in perpetration, or attempt to perpetrate ... larceny of any kind, extortion or kidnapping ... shall be murder of the first degree ....

Under Michigan law, as the state trial judge properly instructed the jury,[5] in order to find a defendant guilty of mruder in the first degree, it is first necessary that the jury find all of the elements of second degree murder. These include that the defendant "intended to kill, that is he intended to do great bodily harm, or that he committed a wanton and wilful act, the natural tendency of which is to cause death or great bodily harm." (App. 102). This element, commonly referred to as the "malice" element, is necessary for a felony-murder conviction in Michigan since the Michigan Supreme Court's decision in People v. Aaron, 409 Mich. 672 (1980).[6]

Thus, when petitioner was charged under Mich. Comp. Laws Ann. §750.316, he was on notice that he was charged with an intentional killing with malice (second degree murder), which was aggravated to first degree murder by either premeditation or the commission of one of the felonies enumerated in section

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[5] Petitioner does not object to the language of the instructions given, only to the fact that a felony-murder theory was allowed to go to the jury.

[6] Prior to Aaron, Michigan applied the common-law felony-murder rule. Aaron was not made to apply retroactively. Id. at 734. The Aaron rule was applicable to petitioner's second trial in 1983.

750.316. Larceny is a section 750.316 enumerated felony. He also knew something else, however. He knew from the first trial that the larceny would be an important element of the prosecution's circumstantial case, since it was his possession of the victim's stolen goods and his attempts to peddle them that formed a substantial part of the State's case. Since it was clear that a larceny had been commited, and likely that a jury would conclude that a strangulation killing was a direct result of someone acting with an intent to kill, petitioner, by way of defense, attempted to convince the jury that he was not involved at all. Since no one could directly connect petitioner with the crime, this was not a defense bereft of any possibility of success. Thus, the contours of his defense were not shaped by the particular aggravating circumstance on which the prosecution might choose to rely in attempting to prove first degree murder.

In arguing that the trial was fatally flawed by the prosection switching theories at the end of the trial, petitioner relies primarily on two cases, Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), and Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986). Although we find both of these cases apposite, we do not find them controlling under the facts here.

In Watson, defendant Watson was involved in the alleged attempt to rob a grocery store, which resulted in Watson shooting and killing the owner, the latter fact not being in dispute. Watson, in a proceeding under Ohio law, was indicted by a grand jury and charged with premeditated first degree murder only. The prosecution, in his opening statement said: "The evidence ... will convince you ... that ... Watson ... did ... maliciously, premeditatively and while in the act of a robbery murder Willie Dallas." 558 F.2d at 332. Defense counsel immediately made a motion to dismiss the indictment

because of the reference to a robbery.[7] The motion was denied.

There are three factors which distinguish Watson, from our case. First, in Watson, there was no robbery and it was not at all clear that even an attempted robbery was involved. In our case there is no dispute that a larceny occurred. Second, Watson was admittedly the trigger man and he claimed self defense, which would be a defense to premeditated murder, but not felony-murder if a robbery was in fact being committed or attempted. Third, existing Ohio case law provided that:

> [A] felony-murder conviction cannot be sustained under an indictment charging first degree murder with premeditation and deliberate malice. The Ohio Supreme Court in State v. Ferguson, 175 Ohio St. 390, 195 N.E.2d 794 (1964), held that although felony-murder and premeditated murder were both included in the same paragraph of the then existing first degree murder statute, felony-murder and premeditated murder constituted separate offenses.

Watson, 558 F.2d at 334-335 (footnote omitted).

Even if there were no Ohio case law, it is clear that Watson was entitled to know whether he should beat the self-defense drum, which could save him from a premeditated murder conviction, or concentrate his efforst on showing no robbery was contemplated, which could get him off the felony-murder hook. Golochowicz, as we have explained, was not on the horns of such a

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[7] Under the then existing Ohio first degree murder statute, premeditated murder and felony murder were both included in the first degree murder statute.

dilemma here.

Givens v. Housewright involved a first degree murder prosecution in which the trial judge instructed the jury on two types of first degree murder: murder by torture and premeditated murder. The significant difference between the two is that in a murder-by-torture prosecution there need be no intent to kill. Givens maintained the information did not give him adequate notice that he would face a charge of murder by torture. Although the state courts and the federal district court rejected this argument, the Ninth Circuit agreed with Givens and granted his habeas petition.

Putting aside whether we agree with the Ninth Circuit conclusion, the difference between Givens and the instant case is clear. Givens structured a defense on no intent to kill, only to have the rug pulled out from under him at the conclusion of the case. Golochowicz was not placed in a similar position.

In reaching our conclusion that no error occurred here which entitles Golochowicz to habeas relief, we emphasize that our habeas review of this state court decision is "the narrow one of due process, and not the borad exercise of supervisory power that [a state] would possess in regard to [its] own trial court.'" Donnelly v. DeChristoforo, 416 U.S. 637. 642 (1974) (footnote omitted) (quoting from DeChristoforo v. Donnelly, 473 F.2d 1237, 1240 (1st. Cir. 1973)). This point is well illustrated by the reversal of Golochowicz's first conviction by the Michigan Supreme Court. The court was obviously concerned with the misuse of the "separate crimes" doctrine and, in addition to overturningn Golochowicz's conviction, used its supervisory powers to promulgate a prophylactic rule for the future. Whether a federal court in a habeas proceeding would have been compelled to reach the same result is open to serious question.

Although the great number of habeas cases decided by the Supreme Court and the lower federal courts has resulted in a body of law which can only be described as Byzantine,[8] there is one concept that remains constant. Fundamental fairness is the ultimate test in evaluating a due process claim. It is a test that cuts both ways. For example, in Murray v. Carrier, 477 U.S. 478 (1986), the Court applied the concept of fundamental fairness and overlooked procedural irregularities.[9] Cutting the other way is the view expressed by at least some members of the Court that fundamental fairness should require the federal courts to entertain habeas petitions "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (dealing with successive habeas petitions).

Against this backdrop, we find no absence of fundamental fairness insofar as Golochowicz's trial was concerned. The original charge was never limited to premeditated murder and he was not deprived of his defense by the prosecutor's change of emphasis.

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[8] Justice Stevens opined that the Court "has lost its way in a procedural maze of its own creation." Smith v. Murray, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting).

[9] "Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Murray v. Carrier, 477 U.S. 478, 496 (1986).

III.

Petitioner also raises three other arguments: (1) the court lacked jurisdiction to try petitioner for felony murder after a bindover for murder, (2) ineffective assistance of counsel, and (3) denial of a fair trial due to testimony being introduced that he ws given his Mlranda rights, although he made no statement to the police.[10] Upon review, we find no merit to any of these arguments. The district judge addressed all of these issues, and we agree with his resolution and adopt it as this court's opinion.

AFFIRMED.

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[10] The jury was never told he made no statement.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEROME GOLOCHOWICZ,

Petitioner,

CASE NO. 88-CV-72296-DT

vs.

HENRY GRAYSON, Warden, Charles Egeler Correctional Facility,

HON. BARBARA K. HACKETT

Respondent.
_____/

MEMORANDUM OPINION

Petitioner, represented by counsel, seeks the issuance of a writ of habeas corpus to release him from the custody of the respondent warden. He was sentenced to life in prison after a jury convicted him of first degree felony mruder in early 1983.

The petitioner raises five issues: (1) he was convicted of felony murder after being tried on the theory of premeditated murder; (2) the trial court lacked jursidction to try him for felony murder because he was bound over on a charge of murder; (3) the trial judge should have disqualified himself; (4) he had ineffective assistance of trial counsel; and (5) he was denied a fair trial because the jury heard that he was advised of his Miranda rights in a way that implied he made no statements.

I

In support of his first claim, counsel for petitioner relies primarily on Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), and Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986). The court concludes that both cases are distinguishable. Watson involved an indictment returned by an Ohio grand jury. The law regarding amendments to indictments and variances in proof from the charges is very strict, in recognition of the fact that it is the grand jury, and not the prosecutor, who accuses the defendant. By contrast, F.R.Cr.P. 7(e) allows a federal prosecutor's information "to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." The court is aware that this case is not governed by Rule 7, but the distinction is obvious as between an indictment and an information, and the record fails to show any prejudice to petitioner is the sense that he was deprived of fair notice and an opportunity to defend. As noted by the Attorney General, plaintiff's trial counsel did not object on federal due process grounds to the instruction, and the prosecutor's information was in a form that allowed either (or both) theories to be pursued at trial (Respondent's Brief, p. 5). As noted by the Michigan Court of Appeals, "[t]he defense presented here was that of a failure by the prosecutor to connect defendant with this crime. Such a defense would have been equally appropriate against a charge of felony-murder."

The Ninth Circuit decision in Givens presents a closer question, because that court concluded that a criminal information charging the accused "'with malice aforethough, wilfully and feloniously'" killing the victim "'by striking [her] about the head and body with his fists'"

did not provide notice to the accused adequate to enable him to prepare a defense against the charge of murder by torture, upon which he was apparently convicted. Givens, supra, 786 F.2d at 1380, 1381. However, the Michigan cases cited by the Attorney General (Respondent's Brief, p. 5) make it clear to this court that a Michigan criminal defense lawyer would necessarily expect the prosecution to proceed upon both theories that were utilized in the case at bar. The court again notes the failure of petitioner to show how he was prejudiced.

II

The second issue raised, that the trial court lacked jurisdiction to try petitioner as a felony-murder theory because he was bound over on a premeditated murder theory, is not cognizable in a federal habeas corpus proceeding because it involves state law questions only. There is no constitutional requirement for a preliminary examination to be held before the state may try an accused, and even of the stricter arena of the indictment system of criminal justice, "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits. The Fifth Amendment requires nothing more." (emphasis supplied). Costello v. United States, 350 U.S. 359 at 363 (1956).

III

Petitioner's third claim, that Judge Ziem should have disqualified himself from holding the evidentiary hearing on the ineffective assistance of counsel claim because he had stated at the time of sentencing that he

thought petitioner was very capably represented by counsel, is also without federal constitutional merit. Such a statement merely reflects the trial judge's state of mind after presiding at the trial and in the context of a sentencing dialogue. It does not indicate a judicial bias regarding the case petitioner later presented at the evidentiary hearing on his claim if ineffective assistance. United States v. Grinnell Corporation, 384 U.S. 563 (1963); Bradley v. Milliken, 620 F.2d 1143 (6th Cir.), cert. denied 449 U.S. 870 (1980); Shaw v. Martin, 733 F.2d 304 (4th Cir.), cert. denied 469 U.S. 873 (1984).

IV

Petitioner's claim of ineffective assistance of trial counsel contains the following assertions of counsel deficiencies:

(1) counsel failed to respond to his request for information and a companion request to file a motion for discovery;

(2) counsel failed to object to the introduction of allegedly inflammatory photographs;

(3) counsel declined to follow petitioner's request that no witnesses be waived;

(4) counsel failed to ask questions of the witness suggested by petitioner;

(5) counsel should have reserved his opening statement until the prosecution rested its case;

(6) counsel, without petitioner's consent, gave over a psychological report in which petitioner admitted the killing and gave mitigating circumstances. This led to petitioner not testifying at his trial because of fear of impeachment; and

(7) counsel continually changed his theory of the case, from insufficient evidence to diminished capacity and back again.

The treatment accorded this issue by the Michigan Court of Appeals more than adequately deals with this subject, and this court adopts it by reference. The following extract is appropriate:

> Defendant's first complaint with his trial counsel's representation concerns the failure to file a motion for discovery until six days before trial despite an earlier request by defendant that such a motion be made. Trial counsel testified, however, that he was permitted to review all documentary and physical evidence prior to trial. Further, defendant's primary concern centers around a report allegedly failing to link defendant with sperm found in the victim's anus. Trial counsel's cross-examination of two prosecution witnesses established that no connection could be made, and also revealed a discrepancy in their testimony as to whether any evidence of semen existed. These points were covered in the closing argument to the jury. It is therefore clear, as in People v. Anderson, 112 Mich. App. 640, 647; 317 NW2d 205 (1981), that defendant's attorney could not have been more effective if an earlier discovery motion had been filed, and such action would not have afforded defendant a reasonably likely chance of acquittal.
>
> Defendant also complains of his trial counsel's failure to pass all relevant documents and evidence along to defendant for his review of same. While we agree that defendant had a right to become personally involved in the preparation of his defense, we do not belive that an attorney's failure to actually involve his client constitutes the ineffective assistance of counsel. The rule was

designed primarily to protect the defendant's right to a fair trial. Strickland v. Washington, US ; 104 S Ct 2052; 80 LEd2d 674, 694 (1984); People v. Garcia, supra. We do not believe defendant was denied this right due to his inability to view the documentary evidence prior to trial.

Next, defendant complains of his counsel's failure to object to the introduction of two photographs of the victim's body. Although the photographs were not included in the record, certain testimony described them as showing the victim's head face-down, a bathrobe tie wrapped around his neck, with the remainder of his body covered by a blanket. Since the photographs were not particularly gruesome, we do not believe a reasonable probability of acquittal would have resulted from their exclusion.

Defendant also cites his attorney's failure to object to the testmiony of one of the arresting police officers regarding defendant's receipt of Miranda warnings. As discussed earlier, since defendant's silence was never mentioned, we find no merit to this argument. An objection may have highlighted the testimony for the jury, and thus the failure to object may have been legitimate trial strategy. In any event, the jury was cautioned by the trial court not to consider the defendant's silence as an admission of guilty, and thus we find no support for defendant's ineffective assistance claim.

Next, defendant lists various questions which he requested his attorney ask during the examination of certain witnesses and complains

that his request was ignored. His attorney testified, however, that some of the questions were indeed asked, although in reworded form. The remaining questions, he considered dangerous to his client's interests, and thus he declined to use them. Again, we consider such a decision a matter of trial strategy, an area in which we decline to substitute our judgment for that of trial counsel. People v. Burns, 118 Mich App 242, 247; 324 NW2d 589 (1982).

We also find no merit to defendant's complaint with his counsel's decision to waive three witnesses whose testimony he belived could offer nothing of substance, and his decision to give an opening statement contrary to the defendant's wishes. These decisions were, again, legitimate trial tactics. Although a defendant has the right to conduct his own defense, an attorney has the obligation to represent his client competently. Further, we cannot agree that either decision was of such significance that the defendant's chances of acquittal were seriously affected.

Finally, defendant contends that his attorney released a psychiatric report compiled by clinical psychologist Michael Kalisewicz to the Forensic Center without his permission. When the defendant decided prior to trial to abandon a diminished capacity defense in favor of one of insufficient evidence, the prosecutor relayed his intent to call Kalisewicz as an impeachment witness. Defendant now claims the fear of impeachment influenced his decision not to testify at trial.

Whether or not defendant actually agreed to the release of the report, we do not believe that its release constituted the ineffective assistance of counsel. The report would have been quite helpful if defendant had continued to pursue the diminished capacity defense. For example, the report concluded that the "flood of emotions" experienced by defendant at the time of the murder was counterindicative of premeditation. Thus, at the time of the report's release, the trial counsel's action constituted a legitimate step toward preparing the best possible defense for his client. Although the report was of no value in presenting an insufficient evidence defense, one must rely upon hindsight to conclude that its release was unwise. Further, despite defendant's claims on appeal, there is no reason to believe that the fear of impeachment played a role in his decision not to testify since defendant did not testify at his first trial, which was held prior to the preparation and ultimate release of the report. Finally, in light of the evidence presented at trial linking defendant with the murder, we do not believe his testimony would have provided a reasonably likely chance of acquittal. Therefore, defendant's claim that he was denied the effective assistance of counsel is rejected and his conviction is affirmed.

V

Lastly, petitioner's claim that his constitutional right to remain silent was invaded by the testimony of the arresting officers that he was advised of his "rights" is without merit. None of the cases cited by petitioner's

counsel supports a claim for habeas relief on this basis. The jury was never informed directly that petitioner had remained silent, although it could have inferred that fact from the absence of any statement given, just as they knew he did not testify as a witness in the trial itself. There is no claim that the prosecutor argued petitioner's silence to the jury, and he was free to request the appropriate cautionary instruction if he so chose. Finally, as noted by The Michigan Court of Appeals, the failrue to object at trial makes appellate review doubtful. For habeas purposes, petitioner would have to show both cause and prejudice, and he has done neither.

The petition for a writ of habeas corpus will be denied. An appropriate Order and Judgment may enter.

BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

Dated: August 29, 1989